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PTO/SB/65 (03-09)

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U.S. Patent and Trademark Office; U.S. DEPARTMENT OF COMMERCE

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**PETITION TO ACCEPT UNAVOIDABLY DELAYED PAYMENT OF  
MAINTENANCE FEE IN AN EXPIRED PATENT (37 CFR 1.378(b))**Docket Number (Optional)  
33572/04008Mail to: Mail Stop Petition  
Commissioner for Patents  
P.O. Box 1450  
Alexandria VA 22313-1450  
Fax: (571) 273-830006/10/2010 DALLEN 00000003 030172  
01 FC:1599 1940.00 DA

5616851

NOTE: If information or assistance is needed in completing this form, please contact Petitions Information at (571) 272-3282.

Patent Number: 5,616,851Application Number: 08/536,209Issue Date: April 1, 1997Filing Date: Sept. 29, 1995

CAUTION: Maintenance fee (and surcharge, if any) payment must correctly identify: (1) the patent number (or reissue patent number, if a reissue) and (2) the application number of the actual U.S. application (or reissue application) leading to issuance of that patent to ensure the fee(s) is/are associated with the correct patent. 37 CFR 1.386(c) and (d).

Also complete the following information, if applicable:

The above-identified patent:

☐ is a reissue of original Patent No. \_\_\_\_\_ original issue date \_\_\_\_\_;  
original application number \_\_\_\_\_,  
original filing date \_\_\_\_\_.☐ resulted from the entry into the U.S. under 35 U.S.C. 371 of international application  
\_\_\_\_\_ filed on \_\_\_\_\_.**CERTIFICATE OF MAILING OR TRANSMISSION (37 CFR 1.8(a))**

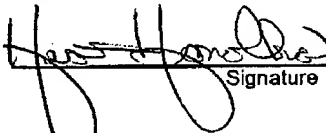
I hereby certify that this paper (along with any paper referred to as being attached or enclosed) is

(1) being deposited with the United States Postal Service on the date shown below with sufficient postage as first class mail in an envelope addressed to Mail Stop Petition, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 OR

(2) transmitted by facsimile on the date shown below to the United States Patent and Trademark Office at (571) 273-8300.

June 4, 2010

Date



Signature

Heather Homolka

Typed or printed name of person signing Certificate

[Page 1 of 4]

12/14/2010 CKH OK 00000016 030172

5616851

01 FC:1599 2055.00 DA

This collection of information is required by 37 CFR 1.378(b). The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11 and 1.14. This collection is estimated to take 8 hours to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Mail Stop Petition, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

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1. SMALL ENTITY

☒ Patentee claims, or has previously claimed, small entity status. See 37 CFR 1.27

2. LOSS OF ENTITLEMENT TO SMALL ENTITY STATUS

☐ Patentee is no longer entitled to small entity status. See 37 CFR 1.27(g)

3. MAINTENANCE FEE (37 CFR 1.20(e)-(g))

The appropriate maintenance fee must be submitted with this petition, unless it was paid earlier.

NOT Small Entity			Small Entity		
Amount	Fee	(Code)	Amount	Fee	(Code)
<input type="checkbox"/> \$ _____	3 ½ yr fee	(1551)	<input type="checkbox"/> \$ _____	3 ½ yr fee	(2551)
<input type="checkbox"/> \$ _____	7 ½ yr fee	(1552)	<input checked="" type="checkbox"/> \$ 1,240	7 ½ yr fee	(2552)
<input type="checkbox"/> \$ _____	11 ½ yr fee	(1553)	<input type="checkbox"/> \$ 2,055	11 ½ yr fee	(2553)

MAINTENANCE FEE BEING SUBMITTED \$ 3,295

4. SURCHARGE

The surcharge required by 37 CFR 1.20(i)(1) of \$ 700.00 (Fee Code 1557) must be paid as a condition of accepting unavoidably delayed payment of the maintenance fee.

SURCHARGE FEE BEING SUBMITTED \$ 700.00

5. MANNER OF PAYMENT

- ☐ Enclosed is a check for the sum of \$ \_\_\_\_\_
- ☒ Please charge Deposit Account No. 030172 the sum of \$ 3,995.00
- ☐ Payment by credit card. Form PTO-2038 is attached.

6. AUTHORIZATION TO CHARGE ANY FEE DEFICIENCY

☒ The Director is hereby authorized to charge any maintenance fee, surcharge or petition fee deficiency to Deposit Account No. 030172

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## 7. OVERPAYMENT

As to any overpayment made, please

☒ Credit to Deposit Account No. 030172

OR

☐ Send refund check

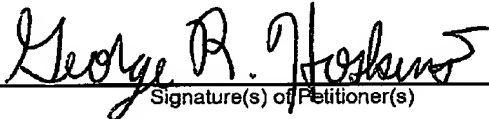
## WARNING:

Petitioner/applicant is cautioned to avoid submitting personal information in documents filed in a patent application that may contribute to identity theft. Personal information such as social security numbers, bank account numbers, or credit card numbers (other than a check or credit card authorization form PTO-2038 submitted for payment purposes) is never required by the USPTO to support a petition or an application. If this type of personal information is included in documents submitted to the USPTO, petitioners/applicants should consider redacting such personal information from the documents before submitting them to the USPTO. Petitioner/applicant is advised that the record of a patent application is available to the public after publication of the application (unless a non-publication request in compliance with 37 CFR 1.213(a) is made in the application) or issuance of a patent. Furthermore, the record from an abandoned application may also be available to the public if the application is referenced in a published application or an issued patent (see 37 CFR 1.14). Checks and credit card authorization forms PTO-2038 submitted for payment purposes are not retained in the application file and therefore are not publicly available.

## 8. SHOWING

The enclosed statement will show that the delay in timely payment of the maintenance fee was unavoidable since reasonable care was taken to ensure that the maintenance fee would be paid timely and that this petition is being filed promptly after the patentee was notified of, or otherwise became aware of, the expiration of the patent. The statement must enumerate the steps taken to ensure timely payment of the maintenance fee, the date and the manner in which the patentee became aware of the expiration of the patent, and the steps taken to file the petition promptly.

## 9. PETITIONER(S) REQUESTS THAT THE DELAYED PAYMENT OF THE MAINTENANCE FEE BE ACCEPTED AND THE PATENT REINSTATED.

  
Signature(s) of Petitioner(s)June 4, 2010

Date

George R. Hoskins

Typed or printed name(s)

46,780

Registration Number, if applicable

800 Superior Avenue, Suite 1400

Address

216-622-8200

Telephone Number

Cleveland, Ohio 44114

Address

## ENCLOSURES:

- ☒ Maintenance Fee Payment  
☒ Statement why maintenance fee was not paid timely  
☒ Surcharge under 37 CFR 1.20(l)(1) (fee for filing the maintenance fee petition)  
☒ Other: Declarations in Support of Statement

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PTO/SB/65 (03-09)

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Under the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number.

37 CFR 1.378(d) states: "Any petition under this section must be signed by an attorney or agent registered to practice before the Patent and Trademark Office, or by the patentee, the assignee, or other party in interest."

_____ Signature	June 4, 2010 _____ Date
George R. Hoskins _____ Type or printed name	46,780 _____ Registration Number, if applicable

STATEMENT

(In the space below, please provide the showing of unavoidable delay recited in paragraph 8 above.)

PLEASE SEE ATTACHED STATEMENT AND DECLARATIONS

*(Please attach additional sheets if additional space is needed)*

[Page 4 of 4]

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## CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that this document is being transmitted to the United States Patent and Trademark Office via facsimile at 571.273.8300 on this 4th day of June 2010.

Signature

Heather Homolka

Customer Number

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## IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Patent of :

McMahon, et al.

Patent No.: 5,616,851

Issued: April 1, 1997

App. No.: 08/536,209

Filed: Sept. 29, 1995

For: Ex-Situ Grain Moisture Analyzer  
For a Combine

Attorney Docket: 33572/04008

Mail Stop Petition  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

**Statement Showing That Delay To Pay Maintenance Fees Was Unavoidable  
in Support of Petition Under 37 C.F.R. § 1.378(b)**

Petitioner Agratronix LLC provides this statement in support of its petition to the Director of the Office under 37 C.F.R. § 1.378(b) and M.P.E.P. § 2590 to revive U.S. Patent No. 5,616,851 ("the '851 patent"), which has expired for failure to timely pay maintenance fees. Accompanying the petition are the required maintenance fees set forth in 37 C.F.R. § 1.20 (e)-(g); the surcharge set forth in 37 C.F.R. § 120(i)(1); this statement showing that the delay was

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unavoidable; and the supporting Declarations of Stafford L. Worely, Gerald E. Stephens, Vytas R. Matas, and Chet J. Bonner.

### **Introduction**

Petitioner Agratronix LLC respectfully submits that the delay in paying the 7.5 year and the 11.5 year maintenance fees for the '851 patent until the filing of this petition was unavoidable. As set forth more fully herein, Petitioner (including its predecessors-in-interest) took reasonable steps to ensure timely payment of the maintenance fees, and has taken reasonable steps to promptly file this petition upon learning of the expiration of the '851 patent. Accordingly, Petitioner respectfully requests a grant of the present petition to accept delayed payment of the maintenance fees.

### **Standard for Relief**

37 C.F.R. § 1.378(b) provides that a petition to accept an unavoidably delayed payment of a maintenance fee must include:

- (1) The required maintenance fee set forth in 37 C.F.R. § 1.20(e)-(g);
- (2) The surcharge set forth in 37 C.F.R. § 1.20(i)(1); and
- (3) A showing that the delay was unavoidable since reasonable care was taken to ensure that the maintenance fee would be paid timely and that the petition was filed promptly after the patentee was notified of, or otherwise became aware of, the expiration of the patent.

### **Petitioner Agratronix LLC and its Predecessors-in-Interest**

Petitioner Agratronix LLC is the current owner of the '851 patent, via a chain of title as described herein.

When the application which would later issue as the '851 patent was filed in September 1995, the three inventors named in the application each executed an assignment of all of their rights in the application to Farmex, Inc. *Bonner Decl.* ¶ 3. These assignments were recorded with the PTO at Reel/Frame 007703/0729. *Id.* ¶ 4. The '851 patent later issued in April 1997, and Farmex, Inc. is identified as the assignee on the face of the '851 patent. *Id.* ¶ 7.

In June 1999, Farmex, Inc. assigned all of the rights in the '851 patent over to Worens Group, Inc. *Id.* ¶ 8. This assignment was recorded with the PTO at Reel/Frame 010024/0571. *Id.* ¶ 9. The moisture tester business previously conducted by Farmex, Inc. (including the '851 patent) was thereafter conducted by Worens Group, Inc. through its "Farmex Electronics" division. *Worley Decl.* ¶ 9, *Stephens Decl.* ¶ 9.

Subsequently, in October 2009, Agratronix LLC purchased all the assets of the Farmex Electronics division of Worens Group, Inc. *Worley Decl.* ¶ 10, *Stephens Decl.* ¶ 10. The moisture tester business previously conducted by Worens Group was thereafter conducted by Agratronix LLC. *Id.* The purchased assets included all rights in the '851 patent, which by October 2009 had expired for failure to pay maintenance fees in April 2005. Thus, at the time this petition is being filed, Agratronix LLC is the owner of all right, title and interest in the expired '851 patent.

References hereinafter to "Farmex" are to Farmex, Inc., owner of the '851 patent from its issuance in April 1997 through June 1999. References hereinafter to "Worens Group" are to Worens Group, Inc., owner of the '851 patent from June 1999 to October 2009. References hereinafter to "Agratronix" are to Agratronix LLC, owner of the '851 patent from October 2009 through the filing of the present petition.

### Fees Due

At all times pertinent hereto, Petitioner, its predecessors-in-interest as well as the single and non-exclusive licensee of the '851 patent collectively employed less than 500 people at any given single time. *Worley Decl.* ¶ 11, *Stephens Decl.* ¶ 11. As a result, they have all qualified and continue to qualify as "small" entities for payment of reduced fees under 37 C.F.R. § 1.27. Therefore, the required maintenance fees set forth in 37 C.F.R. § 1.20(e)-(g) are \$1,240 for the 7.5 year maintenance fee (due April 1, 2005) and \$2,055 for the 11.5 year maintenance fee (due April 1, 2009). The surcharge set forth in 37 C.F.R. § 1.20(i)(1) is \$700. Accordingly, the total fees due with this petition are \$3,995, which are being submitted herewith.

### Steps Taken to Ensure Timely Payment

Farmex engaged the services of a seasoned patent attorney, Vytas R. Matas, Esq. ("Mr. Matas"), in the early 1990s. *Matas Decl.* ¶ 6. Mr. Matas was admitted to the practice of law in Ohio on October 30, 1971, and was admitted to practice in the United States Patent and Trademark Office ("PTO") on February 7, 1972. *Id.* ¶¶ 1, 2. Subsequent to his admission to the patent bar, Mr. Matas was employed as an in-house patent attorney by several large corporations: The Babcock & Wilcox Company, The General Tire and Rubber Company, The Eaton Corporation, and again by The Babcock & Wilcox Company. *Id.* ¶ 3. In the early 1990s, Mr. Matas left The Babcock & Wilcox Company and entered into practice as a solo practitioner practicing patent law. *Id.* ¶ 4. Other than his wife occasionally lending a hand, Mr. Matas did not have any employees or independent contractors that worked for him. *Id.* ¶ 5. Mr. Matas represented Farmex and Worens Group in intellectual property matters from the early 1990s up through his retirement from the practice of law in 2009. *Id.* ¶ 6. In total, Mr. Matas practiced patent law for over thirty-five (35) years.



The preparation and prosecution of the '851 patent was handled by Mr. Matas from the application preparation and filing in September 1995 through its issuance in April 1997. *Matas Decl.* ¶ 7. As shown by PTO records, throughout prosecution of the '851 patent, the correspondence address for PTO communications was Mr. Matas' address at 2412 Cedarwood Road, Pepper Pike, Ohio 44124. *Id.* ¶ 8. When the '851 patent issued in April 1997, that correspondence address continued as the fee address, and currently is still identified in PAIR as the fee address. *Id.* Mr. Matas remained as the patent counsel for Farmex and the Worens Group up through his retirement from the practice of law in 2009. *Id.* ¶ 6. At all times the address for his practice was at 2412 Cedarwood Road, Pepper Pike, Ohio. *Id.* ¶ 8.

When the '851 patent issued in April 1997, Stafford L. Worley ("Mr. Worley") and Gerald E. Stephens ("Mr. Stephens") were owners of Farmex.<sup>1</sup> *Worley Decl.* ¶ 4, *Stephens Decl.* ¶ 4. Soon after, during 1998, Farmex became aware that another party was infringing the '851 patent. *Worley Decl.* ¶ 5, *Stephens Decl.* ¶ 5, *Matas Decl.* ¶ 9. Mr. Worley, with the aid of Mr. Matas, negotiated an agreement with the other party whereby Farmex granted the other party a non-exclusive license in the '851 patent, its corresponding Canadian patent, and associated know-how, in exchange for payment of annual licensing fees. *Worley Decl.* ¶ 6, *Stephens Decl.* ¶ 6, *Matas Decl.* ¶ 10. This License Agreement was executed in 1998 (hereinafter the "License Agreement"). *Id.* The License Agreement thus generated a stream of revenue for Farmex and, later, for Worens Group and Agratronix. *Worley Decl.* ¶ 12, *Stephens Decl.* ¶ 12, *Matas Decl.* ¶ 11. Thus, Mr. Matas, Mr. Worley, and Mr. Stephens have all been aware of the importance of the '851 patent to the business of Farmex and Worens Group since 1998 including the 2004-

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<sup>1</sup> At all relevant times, Mr. Worley and Mr. Stephens were owners of Farmex and Worens Group. *Worley Decl.* ¶¶ 4, 8; *Stephens Decl.* ¶¶ 4, 8.

2005 timeframe. *Matas Decl.* ¶ 12, *Worley Decl.* ¶ 13, *Stephens Decl.* ¶ 13. And, they were all aware that periodic maintenance fees needed to be paid for the '851 patent. *Id.*

To avoid missing upcoming due dates, it was Mr. Matas' normal practice to docket upcoming due dates by handwritten notation on his personal flip calendar. *Matas Decl.* ¶ 13. Farmex, the Worens Group, and Agratronix do not have their own system in place to maintain file(s) for patents or to docket upcoming maintenance fee due dates. Farmex and Worens Group relied on the recordkeeping and correspondence of their patent attorney to inform them of upcoming fee due dates and to pay maintenance fees. *Worley Decl.* ¶ 14, *Stephens Decl.* 14.

Mr. Matas used his personal flip calendar docketing system and the Maintenance Fee Reminder from the PTO to track upcoming maintenance fee due dates. *Matas Decl.* ¶ 14. Prior to when a maintenance fee was due to be paid to the PTO, it was Mr. Matas' normal practice and procedure to send a letter to Farmex or, later, Worens Group reminding them of upcoming dates for payment of maintenance fees. *Id.* ¶ 15. Mr. Matas' procedure was to receive the Maintenance Fee Reminder form from the PTO and then send a letter to Farmex or Worens Group directing them to send a check for this upcoming fee to Mr. Matas who would then pay the PTO for the maintenance fee. *Id.* ¶ 16.

Mr. Matas normally placed copies of such Maintenance Fee Reminders and letters he sent to Farmex or Worens Group in files he maintained for each of the issued patents owned by Farmex and Worens Group. *Id.* ¶ 17. Mr. Matas retained individual and separate files for each patent. *Id.* Pursuant to Mr. Matas' normal practice, several of the patent files provided to Calfee by Mr. Matas contained copies of the Maintenance Fee Reminders and letters to Farmex/Worens Group for the patents that they owned. *Bonner Decl.* ¶ 28. There is no indication in Mr. Matas' file for the '851 patent, however, that he received the 7.5 year Maintenance Fee Reminder for the

'851 patent that was mailed by the PTO on October 20, 2004. *Id.* ¶ 10. His '851 patent file also lacked any copies of letters to Worens Group informing the company that the 7.5 year maintenance fee was due for the '851 patent. *Id.* ¶¶ 8, 9. In addition, the file for the '851 patent did not contain a "notice of abandonment" for the '851 patent. *Id.* ¶ 11.

Mr. Matas cannot explain the reason why these documents are not in his file for the '851 patent other than he cannot recall what specifically happened related to these documents in view of his severe health problems that he experienced in 2004 and 2005 further described below. *Matas Decl.* ¶ 20. In addition, Mr. Matas indicates that he does not know whether he ever received a Maintenance Fee Reminder Statement from the PTO related to the 7.5 year maintenance fee for the '851 patent due to these same health problems. *Id.* ¶ 45. Mr. Matas further believes that the reason his flip calendar handwritten reminder system did not catch the due dates for the 7.5 year maintenance fee was because of his same severe health issues that occurred in 2004 and 2005. *Id.* ¶ 46.

In addition, there is no indication that Worens Group received a letter regarding the 7.5 year maintenance fee for the '851 patent. Persons at Worens Group communicating with Mr. Matas were instructed to forward any letter from Mr. Matas concerning payment of PTO fees to Mr. Worley or Mr. Stephens when received by Farmex or Worens Group. *Worley Decl.* ¶ 16, *Stephens Decl.* ¶ 16. Accordingly, if such a letter had been sent to Worens Group, Mr. Worley or Mr. Stephens would have received that letter. *Worley Decl.* ¶ 17, *Stephens Decl.* ¶ 17. Neither Mr. Worley nor Mr. Stephens recall receiving such a letter. *Worley Decl.* ¶ 20, *Stephens Decl.* ¶ 19. Upon receipt of such a letter, Mr. Worley would normally review the subject patent and determine whether to pay the maintenance fee. *Worley Decl.* ¶ 18. Mr. Worley would in some cases have a discussion with Mr. Stephens before instructing Mr. Matas to either pay the

fee or allow the patent to expire. *Worley Decl.* ¶ 19, *Stephens Decl.* ¶ 18. With respect to the '851 patent, there would have been no such discussion and they would have promptly instructed Mr. Matas to pay the fee upon receiving notice from Mr. Matas because Messrs. Matas, Worley, and Stephens all were aware that the '851 patent was generating license income for Worens Group. *Worley Decl.* ¶ 22, *Stephens Decl.* ¶ 21, *Matas Decl.* ¶ 11.

Although there were no letters in the files regarding payment of the 7.5 year maintenance fee, one document was located that indicates that Mr. Matas received instructions to pay the 7.5 year maintenance fee. A search of Mr. Matas' patent files revealed that in May 2003, Mr. Matas sent Worens Group an Intellectual Property Status Report ("IPSR") listing all of Worens Group's intellectual property along with upcoming deadlines. *Bonner Decl.* ¶ 30. A copy of the IPSR is attached to Mr. Matas' Declaration as Exhibit 1 (the "May 2003 IPSR"). The May 2003 IPSR is dated May 14, 2003: almost a year prior to the maintenance fee window opening for the '851 patent. *Matas Decl.* ¶ 23. The May 2003 IPSR provided a "current status report" of all nine (9) Worens Group patents then being handled by Mr. Matas. *Id.* ¶ 24. One of those patents was the '851 patent, the fifth item listed on page 2 of the letter. *Id.* ¶ 25. The handwritten notations on the May 2003 IPSR were made by Mr. Matas. *Id.* ¶ 26. Mr. Matas' "OK" notation next to the '851 patent entry meant Worens Group informed Mr. Matas they wanted to maintain the '851 patent, and not let it expire. *Id.* ¶ 27. That conversation would have occurred sometime soon after Mr. Matas sent the letter to Worens Group on May 14, 2003, well before the 7.5 year payment window for the '851 patent actually opened on April 1, 2004. *Id.* ¶ 28. So, at the time of that conversation, Mr. Matas was unable to pay the 7.5 year maintenance fee for the '851 patent on behalf of Worens Group but had been instructed to do so when appropriate. *Id.* ¶ 29.

Moreover, Mr. Matas believes that he entered a directive to pay the 7.5 year maintenance fee on his flip calendar in view of the notification. *Id.* ¶ 30.

After the conversation with Mr. Matas regarding the May 2003 IPSR, Worens Group believed that Mr. Matas had carried out its instructions to pay the 7.5 year maintenance fee, just as he had followed their instructions on many other matters over the course of time. *Worley Decl.* ¶ 26, *Stephens Decl.* ¶ 25. Worens Group relied on the expertise and normal reliability of their seasoned patent attorney whom they believed to be knowledgeable, reliable and trustworthy to carry out their instructions. *Worley Decl.* ¶ 27, *Stephens Decl.* ¶ 26.

During the 2004 and 2005 timeframe, however, Mr. Matas suffered severe health issues. *Matas Decl.* ¶ 32. During that time period, Mr. Matas sought medical attention for a debilitating pinched nerve in his neck caused by disc problems in his spine. *Id.* ¶ 33. This disc problem required neck surgery. *Id.* Prior to the operation on his neck Mr. Matas was required to undergo heart bypass surgery. *Id.* ¶ 34. After heart bypass surgery, Mr. Matas spent several months in rehabilitation. *Id.* After the rehabilitation from his heart surgery ended, Mr. Matas underwent surgery on his neck in an attempt to fix the disc problem. *Id.* ¶ 35. After the disc surgery was completed, Mr. Matas went through several more months of rehabilitation. *Id.* ¶ 36. Both these surgeries and rehabilitation periods caused Mr. Matas to be absent from his legal practice for significant periods during 2004 and 2005. *Id.* ¶ 37.

Mr. Matas was a solo practitioner and did not have anyone to handle his patent matters while he was hospitalized and in rehabilitation. *Id.* ¶ 38. While he was hospitalized and in rehabilitation, Mr. Matas' wife brought him his mail and he provided her with instructions on certain tasks that needed to be completed. *Id.* However, Mr. Matas does not recall receiving the

notice from the PTO that the 7.5 year maintenance fee was due or receiving the notice of abandonment during 2004 and 2005. *Id.* ¶ 39.

To this date, Mr. Matas has not fully recovered and his health issues have lingered. *Id.* ¶ 40. From October 2009 through March 2010, Mr. Matas has been hospitalized several times in Florida. *Id.* ¶ 41. Mr. Matas was hospitalized after suffering partial paralysis and was required to undergo emergency surgery to fuse three vertebrae in his neck. *Id.* ¶ 42. Shortly after this surgery and during his rehabilitation from this most recent surgery in late 2009, Mr. Matas was again hospitalized for congestive heart failure for the first part of 2010. *Id.* ¶ 43. Mr. Matas is still recovering and in rehabilitation from these health related setbacks. *Id.* ¶ 44.

While Mr Matas was ill in 2004 and 2005, his system for paying maintenance fees discussed above did not work properly in some way. Neither Mr. Worley nor Mr. Stephens received a letter from Mr. Matas relating to the 7.5 year maintenance fee being due and requesting that they forward a check to Mr. Matas for paying the maintenance fee. *Worley Decl.* ¶ 20, *Stephens Decl.* ¶ 19. However, they did tell Mr. Matas to pay the fee and intended it be paid after receiving the May 2003 IPSR. *Worley Decl.* ¶ 23, 24, *Stephens Decl.* ¶ 22, 23. Although it was Mr. Matas' normal practice to send a letter requesting the maintenance fee payment be submitted to him prior to paying the maintenance fee, neither Mr. Worley nor Mr. Stephens realized that they did not receive such a letter. *Worley Decl.* ¶ 25, *Stephens Decl.* ¶ 24.

Absent Mr. Matas' poor health in 2004 and 2005, the 7.5 year maintenance fee and the 11.5 year maintenance fee for the '851 patent would have been paid. *Matas Decl.* ¶ 47. Unknown to Messrs. Worley and Stephens, and contrary to their instructions, on April 1, 2005 the '851 patent expired for failure to timely pay the 7.5 year maintenance fee. *Worley Decl.* ¶ 28, *Stephens Decl.* ¶ 27.

The steps taken by Farmex and later by Worens Group to ensure timely payment of maintenance fees were reasonable under the circumstances. "As 35 U.S.C. 41(b) requires the payment of fees at specific intervals to maintain a patent in force . . . a reasonably prudent person in the exercise of due care and diligence would have taken steps to ensure the timely payment of such maintenance fees." M.P.E.P. § 2590 (*citing Ray v. Lehman*, 55 F.3d 606, 609 (Fed. Cir. 1995)). Accordingly, the PTO has applied the "reasonably prudent person" standard in determining if a delay was unavoidable. *See* M.P.E.P. § 2590 ("unavoidable" delay in paying maintenance fees for expired patents is the same standard as "unavoidable" delay for reviving an abandoned patent application). Pursuant to this standard,

The word 'unavoidable' . . . is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business. It permits them in the exercise of this care to rely upon the ordinary and trustworthy agencies of mail and telegraph, worthy and reliable employees, and such other means and instrumentalities as are usually employed in such important business. If unexpectedly, or through the unforeseen fault or imperfection of these agencies and instrumentalities, there occurs a failure, it may properly be said to be unavoidable, all other conditions of promptness in its rectification being present.

*See* M.P.E.P. § 711.03(c) (quoting *In re Muttullath*, 38 App. D.C. 497, 514-515 (1912) (quoting *Ex parte Pratt*, 1887 Dec. Comm'r Pat. 31, 32-33 (1887))).

Petitioner respectfully submits that its predecessors-in-interest Farmex and Worens Group were reasonably prudent in the exercise of due care and diligence to ensure that maintenance fees were paid for the '851 patent. They retained the services of a seasoned patent attorney, Mr. Matas, with many years of experience. Mr. Matas is a licensed professional and is registered with the PTO. *Matas Decl.* ¶¶ 1, 2. Messrs. Matas, Worley and Stephens knew of the importance of the '851 patent in that it was generating a license revenue stream for Farmex and

Worens Group. Farmex and Worens Group reasonably relied on their agent Mr. Matas to carry out their instructions to pay the maintenance fees for the '851 patent. The failure to pay the 7.5 year maintenance fee for the '851 patent due to Mr. Matas' poor health in 2004-2005 was unexpected, unforeseen, and unrealized by Petitioner's predecessors-in-interest.

Petitioner has taken steps to ensure that such an unfortunate event will not occur in the future, now that Mr. Matas has retired from practicing law. Petitioner has retained the services of Calfee, Halter & Griswold LLP ("Calfee"). Calfee has an electronic docketing system in place that tracks due dates for maintenance fees and client's instructions on whether or not to pay the maintenance fees. *Bonner Decl.* ¶ 38. Further, Calfee has a full-time docket clerk and a paralegal that are both responsible for paying maintenance fees for Calfee's clients in a timely manner. *Id.* Accordingly, Agratronix respectfully submits that its predecessors-in-interest regarding the '851 patent exercised reasonable care to ensure that maintenance fees were paid for the '851 patent, and Agratronix is currently taking additional steps to ensure that maintenance fees on its patents will be paid promptly and in a timely fashion.

#### **Date and Manner in Which Petitioner Became Aware of the Expiration of the '851 Patent**

In August 2009, after Mr. Matas' retirement, Agratronix engaged the services of Calfee to prepare and file a new patent application. *Bonner Decl.* ¶ 2. Shortly thereafter, Calfee was instructed to oversee all of Agratronix's issued patents. *Id.* As part of its initial retention as Agratronix's patent counsel, Calfee was asked to identify all of the patents assigned to Farmex, Worens Group and Agratronix. *Id.* As part of this undertaking, Mr. Bonner reviewed the status of all of Agratronix's issued patents. *Id.* ¶ 12. On September 10, 2009 Calfee provided Agratronix with a list of eight (8) issued United States patents, a Canadian patent, and a Canadian patent application along with the legal status of each of them. *Id.* ¶ 13. At that time,



five (5) of the United States patents and the Canadian patent application had expired. *Id.* ¶ 14. Thus, Agratronix became aware of the expired patents in mid to late September 2009. Calfee then began an investigation into the expired patents and determined that, although some of Agratronix's patents were intentionally abandoned, the '851 patent was erroneously allowed to lapse for failure to pay the maintenance fees. *Id.* ¶ 15. This discovery occurred on or about October 23, 2009. *Id.*

#### **Steps Taken to File the Petition Promptly**

Since discovering the expired patents and being instructed to investigate the matter, Calfee has been collecting and reviewing materials, searching for missing documents, interviewing Agratronix employees and Mr. Matas and ascertaining the events leading to the expiration of the patents. *Id.* ¶ 15. The investigation revealed that three (3) of the United States patents and the one Canadian patent application that expired were intentionally abandoned. *Id.* ¶ 17. Leaving two (2) United States patents that were not intentionally abandoned.

Calfee's initial efforts concentrated on the patent that had recently become abandoned because it was just within the time period for reviving under the unintentional standard. For that patent, U.S. Pat. No. 6,637,259, Petitioner promptly filed a petition to revive the patent on October 27, 2009 under the unintentional standard. *Id.* ¶ 18. The petition was granted by the PTO. *Id.*

Calfee next turned its attention to the '851 patent. Because the '851 patent expired in 2005, considerable effort was required to investigate the facts and circumstances surrounding the failure to pay the 7.5 year and 11.5 year maintenance fees. *Id.* ¶ 19. The effort was slightly delayed because harvest time in the fall of 2009 provides Agratronix with a small window for field testing/development of new products, and Agratronix's employees were extremely busy

during this time. *Worley Decl.* ¶ 30, *Stephens Decl.* ¶ 29. The effort was made more onerous because Mr. Matas, Petitioner's former patent counsel, is in poor health and was in and out of a hospital in Florida and in rehabilitation from October 2009 through today. *Matas Decl.* ¶¶ 40-44. Consequently, Calfee was unable to speak with Mr. Matas regarding these issues until February 10, 2010. *Matas Decl.* ¶ 50, *Bonner Decl.* ¶ 20. Mr. Matas explained that his normal practice was to inform Farmex or Worens Group that maintenance fees were due by letter, but he was unable to recall the particular circumstances surrounding the 7.5 year and 11.5 year maintenance fees for '851 patent. *Bonner Decl.* ¶ 21. Mr. Matas also explained that it was his standard practice to place a copy of such letters and any response(s) in his files. *Id.* ¶ 22. Mr. Matas was unable to locate his flip calendar for the 2004-2005 years. *Matas Decl.* ¶ 27.

Accordingly, Calfee needed to review Mr. Matas' file for the '851 patent prior to filing this petition. Mr. Matas informed Calfee, however, that all of his files relating to Petitioner's patents were locked up in his offices in Ohio and he was in Florida in rehabilitation. *Matas Decl.* ¶ 51, *Bonner Decl.* ¶ 23. Mr. Matas was able to arrange to have the file for the '851 patent sent to Agratronix, who forwarded the file to Calfee on March 16, 2010. *Matas Decl.* ¶ 52, *Bonner Decl.* ¶ 24. Calfee thoroughly reviewed Mr. Matas' file for the '851 patent, but could not find any information relating to the 7.5 year or 11.5 year maintenance fees. *Bonner Decl.* ¶ 25. In search of additional documentation and to ensure that any letter(s) had not been misfiled, Calfee requested all of Petitioner's remaining patent files in Mr. Matas' care be transferred to Calfee for review. *Matas Decl.* ¶ 53, *Bonner Decl.* ¶ 26. Calfee received these additional files on March 30, 2010 and thoroughly reviewed all of the files that it received. *Matas Decl.* ¶ 54, *Bonner Decl.* ¶ 27. In accordance with the normal practice identified by Mr. Matas, several of the patent files did contain copies of letters to Farmex or Worens Group relating to payment of

maintenance fees, and responses thereto. *Bonner Decl.* ¶ 28. Three of those files contained responses from Farmex or Worens Group instructing Mr. Matas to intentionally abandon those three patents. *Id.* ¶ 29. No such letter was found for the '851 patent. *Id.* The only letter relating to the 7.5 year or 11.5 year maintenance fees for the '851 patent found in any of the files was the May 2003 IPSR. *Id.* ¶ 37.

After reviewing the files, Calfee was required to conduct several additional interviews of Mr. Matas to fill in missing details prior to completing the petition. *Bonner Decl.* ¶ 32. In early April 2010, Mr. Matas informed Calfee that he may have sent maintenance fee notices by email, without placing a copy in his files. *Matas Decl.* ¶ 56, *Bonner Decl.* ¶ 32. The electronically stored emails were also located at Mr. Matas' address in Ohio. *Matas Decl.* ¶ 57. Calfee asked Mr. Matas, who had just relocated back to Ohio for the summer in mid-April 2010, to retrieve all of his electronically stored email communications regarding the '851 patent for the years surrounding the 7.5 year maintenance fee window and provide those emails to Calfee. *Matas Decl.* ¶¶ 58, 59, *Bonner Decl.* ¶ 33. On May 4, 2010, Mr. Matas provided Calfee with all of the email correspondence in his possession between himself and Petitioner and its predecessors-in-interest. *Matas Decl.* ¶ 60, *Bonner Decl.* ¶ 34. From May 4 until mid-May 2010, Mr. Bonner reviewed all of the email correspondence received by Calfee. *Bonner Decl.* ¶ 35. The email correspondence did not contain any additional information relating to payment of the 7.5 year maintenance fee, or the 11.5 year maintenance fee, for the '851 patent. *Id.* ¶ 36.

In sum, since learning of the expiration of the '851 patent, Petitioner has been diligently searching for and collecting missing documents, interviewing the persons involved, and reviewing files and electronic documents to thoroughly investigate the failure to timely pay the maintenance fees, as well as preparing this petition. The investigation was delayed by the

harvest season, the unavailability of Mr. Matas due to health reasons, the succeeding delay in obtaining Mr. Matas' files for Petitioner's patents (again due to Mr. Matas' health complications), and the delay resulting in obtaining Mr. Matas' electronically stored email communications with Petitioner and its predecessors-in-interest. As soon as Petitioner's current counsel was able to complete its thorough review of all relevant documents and information, the accompanying petition and declarations were prepared, signed and filed.

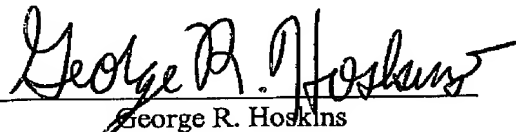
### Conclusion

Petitioner respectfully submits that the delay in paying the 7.5 year and 11.5 year maintenance fees until the filing of this petition was unavoidable, because reasonable care was taken to ensure that the maintenance fees for a licensed patent would be paid timely but such authorized payments were not made because of the extensive medical problems of petitioner's prior solo patent counsel. The accompanying petition was filed promptly after Petitioner's new counsel discovered the expiration of the patent and determined the necessary facts by interviewing the persons involved and reviewing the records. The required maintenance fee set forth in 37 C.F.R. § 120(e)-(g), and the surcharge set forth in 37 C.F.R. § 1.20(i)(1), are enclosed. Accordingly, Petitioner respectfully requests that the Director grant the petition, accept the accompanying delayed maintenance fees, and reinstate the '851 patent.

Respectfully submitted,

Date: June 4, 2010

By:



George R. Hoskins  
Reg. No. 46,780  
Calfee, Halter & Griswold LLP  
800 Superior Avenue  
Cleveland, Ohio 44114  
216-622-8891

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## IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Patent of : )  
McMahon, et al. )  
Patent No.: 5,616,851 )  
Issued: April 1, 1997 )  
App. No.: 08/536,209 )  
Filed: Sept. 29, 1995 )  
For: Ex-Situ Grain Moisture Analyzer )  
For a Combine )

Attorney Docket: 33572/04008

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OFFICE OF PETITIONS.

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Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Declaration of Stafford L. Worely

1. I cofounded Farmex, Inc. ("Farmex") in October of 1975.
2. One of the product lines developed and sold by Farmex was moisture testers.
3. Farmex filed U.S. Patent Application Serial No. 08/536,209 concerning an ex-situ grain moisture analyzer for a combine on September 29, 1995, which issued as U.S. Patent No. 5,616,851 ("the '851 patent") on April 1, 1997.
4. When the '851 patent issued in April 1997, and at all relevant times, I was an owner of Farmex.
5. During 1998, Farmex became aware that another party was infringing the '851 patent.
6. With the aid of Mr. Matas, I negotiated an agreement with the other party whereby Farmex granted the other party a license in the '851 patent, its corresponding Canadian patent, and associated know how, in exchange for payment of annual licensing fees.

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1 of 4

7. In or about June 1999, Farmex assigned its interest in the '851 patent to the Worens Group, Inc. ("Worens Group").
8. At all relevant times, I was an owner of Worens Group.
9. The moisture tester business previously conducted by Farmex was thereafter conducted by Worens Group through its "Farmex Electronics" division.
10. In October 2009, Agratronix LLC purchased all the assets of the Farmex Electronics division of Worens Group, and the moisture tester business previously conducted by Worens Group was thereafter conducted by Agratronix LLC.
11. At all times pertinent hereto, Agratronix and its predecessors-in-interest as well as the single and non-exclusive licensee of the '851 patent collectively employed less than 500 people at any given single time.
12. The license agreement discussed above generated a stream of revenue for Farmex and, later, for Worens Group and Agratronix.
13. Accordingly, Mr. Matas, Mr. Stephens and myself were all aware of the importance of the '851 patent to the business of Farmex and Worens Group since 1998 including the 2004-2005 time period and we were all aware that periodic maintenance fees needed to be paid for the '851 patent.
14. Farmex, the Worens Group, and Agratronix do not have their own system in place to maintain file(s) for patents or to docket upcoming maintenance fee due dates. Farmex and Worens Group relied on the record keeping and correspondence of their patent attorney to inform them of upcoming fee due dates and to pay maintenance fees.
15. From time to time Farmex or Worens Group would receive a letter from Mr. Matas concerning upcoming dates for payment of patent maintenance fees.

16. Persons at Worens Group communicating with Mr. Matas were instructed to forward any letter from Mr. Matas concerning payment of PTO fees to me or Mr. Stephens when received by Farmex or Worens Group.
17. Accordingly, if such a letter had been sent to Worens Group, Mr. Stephens or I would have received that letter.
18. Upon receipt of such a letter, I would normally review the subject patent and determine whether to pay the maintenance fee.
19. In some cases I would have a discussion with Mr. Stephens before instructing Mr. Matas to either pay the fee or allow the patent to expire.
20. I did not receive a letter from Mr. Matas relating to the 7.5 year or 11.5 year maintenance fees being due for the '851 patent.
21. I do not recall having a discussion regarding payment of the 7.5 year or 11.5 year maintenance fees with Mr. Stephens or Mr. Matas in 2004.
22. There would have been no reason to discuss whether the maintenance fee should have been paid, as everyone was aware that Worens Group was receiving a revenue stream from licensing of the '851 patent.
23. In May 2003, Mr. Matas did send an Intellectual Property Status Report (the "May 2003 IPSR") to Worens Group.
24. The May 2003 IPSR indicated that the 7.5 year maintenance fee for the '851 patent was due the following year, and at that time, Mr. Matas was instructed to pay the 7.5 year maintenance fee when appropriate.
25. Although Mr. Matas normally sent a letter near the time that the payment of the maintenance fees were due requesting the maintenance fee payment be submitted to

him prior to paying the maintenance fee, I did not realize that we did not receive such a letter.

26. Worens Group believed that Mr. Matas had carried out its instructions to pay the 7.5 year maintenance fee, just as he had followed their instructions on many other matters over the course of time.

27. Worens Group relied on the expertise and normal reliability of their seasoned patent attorney whom they believed to be knowledgeable, reliable and trustworthy to carry out their instructions

28. I did not know that on April 1, 2005 the '851 patent expired for failure to timely pay the 7.5 year maintenance fee.

29. At no time did I instruct Mr. Matas not to pay the 7.5 year or 11.5 year maintenance fees for the '851 patent.

30. Agratronix learned of the expiration of the '851 patent in the fall of 2009 during harvest time. Harvest time in the fall provides Agratronix with a small window for field testing/development of new products and Agratronix's employees were extremely busy during this time. Accordingly, there was a slight delay in investigating the failure to pay the maintenance fees due to the busy schedule of Agratronix's employees.

31. I declare under penalty of perjury that the foregoing is true and correct.

May 28, 2010

  
Stafford L. Worley



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## IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Patent of:	)	
McMahon, et al.	)	
Patent No.: 5,616,851	)	Attorney Docket: 33572/04008
Issued: April 1, 1997	)	
App. No.: 08/536,209	)	
Filed: Sept. 29, 1995	)	
For: Ex-Situ Grain Moisture Analyzer	)	
For a Combine	)	

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P.O. Box 1450  
Alexandria, VA 22313-1450

Declaration of Gerald E. Stephens

1. I cofounded Farmex, Inc. ("Farmex") in October of 1975.
2. One of the product lines developed and sold by Farmex was moisture testers.
3. Farmex filed U.S. Patent Application Serial No. 08/536,209 concerning an ex-situ grain moisture analyzer for a combine on September 29, 1995, which issued as U.S. Patent No. 5,616,851 ("the '851 patent") on April 1, 1997.
4. When the '851 patent issued in April 1997, and at all relevant times, I was an owner of Farmex.
5. During 1998, Farmex became aware that another party was infringing the '851 patent.
6. With the aid of Mr. Matas, Mr. Worley negotiated an agreement with the other party whereby Farmex granted the other party a license in the '851 patent, its corresponding Canadian patent, and associated know how, in exchange for payment of annual licensing fees.

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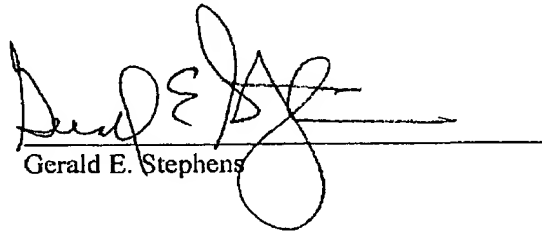
7. In or about June 1999, Farmex assigned its interest in the '851 patent to the Worens Group, Inc. ("Worens Group").
8. At all relevant times, I was an owner of Worens Group.
9. The moisture tester business previously conducted by Farmex was thereafter conducted by Worens Group through its "Farmex Electronics" division.
10. In October 2009, Agratronix LLC purchased all the assets of the Farmex Electronics division of Worens Group, and the moisture tester business previously conducted by Worens Group was thereafter conducted by Agratronix LLC.
11. At all times pertinent hereto, Agratronix and its predecessors-in-interest as well as the single and non-exclusive licensee of the '851 patent collectively employed less than 500 people at any given single time.
12. The license agreement discussed above generated a stream of revenue for Farmex and, later, for Worens Group and Agratronix.
13. Accordingly, Mr. Matas, Mr. Worley and myself were all aware of the importance of the '851 patent to the business of Farmex and Worens Group since 1998 including the 2004-2005 time period and we were all aware that periodic maintenance fees needed to be paid for the '851 patent.
14. Farmex, the Worens Group, and Agratronix do not have their own system in place to maintain file(s) for patents or to docket upcoming maintenance fee due dates. Farmex and Worens Group relied on the record keeping and correspondence of their patent attorney to inform them of upcoming fee due dates and to pay maintenance fees.
15. From time to time Farmex or Worens Group would receive a letter from Mr. Matas concerning upcoming dates for payment of patent maintenance fees.

16. Persons at Worens Group communicating with Mr. Matas were instructed to forward any letter from Mr. Matas concerning payment of PTO fees to me or Mr. Worley when received by Farmex or Worens Group.
17. Accordingly, if such a letter had been sent to Worens Group, Mr. Worley or I would have received that letter.
18. In some cases I would have a discussion with Mr. Worley regarding maintenance fees before Farmex or Worens Group instructed Mr. Matas to either pay the fee or allow the patent to expire.
19. I did not receive a letter from Mr. Matas relating to the 7.5 year or 11.5 year maintenance fees being due for the '851 patent.
20. I do not recall having a discussion regarding payment of the 7.5 year or 11.5 year maintenance fees with Mr. Worley or Mr. Matas in 2004.
21. There would have been no reason to discuss whether the maintenance fee should have been paid, as everyone was aware that Worens Group was receiving a revenue stream from licensing of the '851 patent.
22. In May 2003, Mr. Matas did send an Intellectual Property Status Report (the "May 2003 IPSR") to Worens Group.
23. The May 2003 IPSR indicated that the 7.5 year maintenance fee for the '851 patent was due the following year, and at that time, Mr. Matas was instructed to pay the 7.5 year maintenance fee when appropriate.
24. Although Mr. Matas normally sent a letter near the time that the payment of the maintenance fees were due requesting the maintenance fee payment be submitted to

him prior to paying the maintenance fee, I did not realize that we did not receive such a letter.

25. Worens Group believed that Mr. Matas had carried out its instructions to pay the 7.5 year maintenance fee, just as he had followed their instructions on many other matters over the course of time.
26. Worens Group relied on the expertise and normal reliability of their seasoned patent attorney whom they believed to be knowledgeable, reliable and trustworthy to carry out their instructions
27. I did not know that on April 1, 2005 the '851 patent expired for failure to timely pay the 7.5 year maintenance fee.
28. At no time did I instruct Mr. Matas not to pay the 7.5 year or 11.5 year maintenance fees for the '851 patent.
29. Agratronix learned of the expiration of the '851 patent in the fall of 2009 during harvest time. Harvest time in the fall provides Agratronix with a small window for field testing/development of new products and Agratronix's employees were extremely busy during this time. Accordingly, there was a slight delay in investigating the failure to pay the maintenance fees due to the busy schedule of Agratronix's employees.
30. I declare under penalty of perjury that the foregoing is true and correct.

May 22, 2010

  
Gerald E. Stephens

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## IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Patent of:	)	
McMahon, et al.	)	
Patent No.: 5,616,851	)	Attorney Docket: 33572/04008
Issued: April 1, 1997	)	
App. No.: 08/536,209	)	
Filed: Sept. 29, 1995	)	
For: Ex-Situ Grain Moisture Analyzer	)	
For a Combine	)	

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Declaration of Vytas Matas

1. I am an attorney and was admitted to practice law in the State of Ohio on October 30, 1971.
2. I was also admitted to practice before the United States Patent and Trademark Office ("PTO") under Registration No. 26,199 on February 7, 1972. I practiced patent law since this date until December 2009 when I retired.
3. Subsequent to my admission to the patent bar, I was employed as an in-house patent attorney by several large corporations: The Babcock & Wilcox Company, The General Tire and Rubber Company, The Eaton Corporation, and again by The Babcock & Wilcox Company.
4. In the early 1990s, I left The Babcock & Wilcox Company and entered into practice as a solo practitioner practicing patent law.

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1 of 7

5. Other than my wife occasionally lending a hand, I did not have any employees or independent contractors that worked for me.
6. I was patent counsel for Farmex, Inc. ("Farmex") and the Worens Group, Inc. ("Worens Group") from the early 1990s up through my retirement in 2009.
7. I handled the prosecution of U.S. Patent No. 5,616,851 ("the '851 patent") from the application filing in September 1995 through its issuance in April 1997.
8. The address for my practice was always 2412 Cedarwood Road, Pepper Pike, Ohio, 44124. This was the correspondence address for PTO communications. When the '851 patent issued in April 1997, my correspondence address continued as the fee address, and currently is still identified in PAIR as the fee address.
9. Soon after the '851 patent issued in April 1997 Farmex became aware that another party was infringing the '851 patent.
10. Mr. Worley, with my aid, negotiated an agreement with the other party whereby Farmex granted the other party a license in the '851 patent, its corresponding Canadian patent, and associated know how, in exchange for payment of annual licensing fees. The License Agreement was executed in 1998 (the "License Agreement").
11. The license agreement has generated a stream of revenue for Farmex and, later, for Worens Group and Agratronix.
12. Mr. Worley, Mr. Stephens, and I were all aware of the importance of the '851 patent and we were all aware that periodic maintenance fees needed to be paid for the '851 patent.

13. It was my normal practice to docket upcoming due dates by hand written notation on my personal flip calendar.
14. I used my personal flip calendar docketing system and the Maintenance Fee Reminder from the PTO to track upcoming maintenance fee due dates.
15. Prior to when a maintenance fee was due to be paid to the PTO, it was my normal practice and procedure to send a letter to Farmex or, later, Worens Group reminding them of upcoming dates for payment of maintenance fees.
16. My procedure was to receive the Maintenance Fee Reminder form from the PTO and then send a letter to Farmex or Worens Group directing them to send a check for the upcoming maintenance fee to me and I would then pay the PTO for the maintenance fee.
17. I retained individual and separate files for each patent or patent application and I normally placed a copy of the letter I sent to Farmex and Worens Group in a file that I maintained for each of the issued patents owned by Farmex and Worens Group.
18. After sending a letter concerning upcoming maintenance fee deadlines, I would make sure to get appropriate instructions whether or not to pay the fees.
19. I do not specifically recall sending a letter to either Mr. Worley, Mr. Stephens, or anyone else employed by Worens Group relating to the 7.5 year or 11.5 year maintenance fees being due for the '851 patent.
20. I cannot explain why these documents are not in the file for the '851 patent nor can I recall what specifically happened related to these documents because I suffered severe health problems during 2004 and 2005.

21. In May 2003, I sent Worens Group an Intellectual Property Status Report ("IPSR") listing all of Worens Group's intellectual property along with upcoming deadlines.
22. A copy of that IPSR is attached hereto as Exhibit 1 (the "May 2003 IPSR").
23. The May 2003 IPSR is dated May 14, 2003, almost a year prior to the maintenance fee window opening for the '851 patent.
24. The May 2003 IPSR provided a "current status report" of all nine (9) Worens Group patents that I was handling at that time.
25. One of those patents was the '851 patent, the fifth item listed on page 2 of the letter.
26. The handwritten notations on the May 2003 IPSR were made by me.
27. The "OK" notation next to the '851 patent entry meant Worens Group informed me they wanted to maintain the '851 patent, and not let it expire.
28. That conversation would have occurred sometime soon after I sent the letter to Worens Group on May 14, 2003, well before the 7.5 year payment window for the '851 patent actually opened on April 1, 2004.
29. At the time of that conversation, I was unable to pay the 7.5 year maintenance fee for the '851 patent on behalf of Worens Group but had been instructed to do so when appropriate.
30. I believe that I entered a directive to pay the 7.5 year maintenance fee in 2004 /2005 on my flip calendar in view of the notification.
31. I cannot locate my 2004 / 2005 flip calendar.
32. During the 2004 and 2005 time frame, I suffered severe health issues.

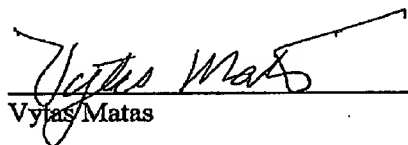


33. During that time period I sought medical attention for a debilitating pinched nerve in my neck caused by disc problems in my spine. This disc problem required neck surgery.
34. Prior to the operation on my neck I was required to undergo heart by-pass surgery. After heart by-bass surgery I spent several months in rehabilitation.
35. After rehabilitation from my heart surgery ended, I underwent surgery on my neck in an attempt to fix the disc problem.
36. After the disc surgery was completed, I went through several more months of rehabilitation.
37. Both these surgeries and rehabilitation periods caused me to be away from my legal practice for significant periods during 2004 and 2005.
38. Because I was a solo practitioner I did not have anyone to handle my patent matters while I was hospitalized and in rehabilitation. While I was hospitalized and in rehabilitation, my wife brought me my mail and I provided her with instructions on certain tasks that needed to be completed.
39. I do not recall receiving the notice from the PTO that the 7.5 year maintenance fee was due or receiving the notice of abandonment during 2004 and 2005.
40. To this date, I have not fully recovered and my health issues have lingered.
41. From October 2009 through March 2010, I have been hospitalized several times in Florida.
42. I was hospitalized after suffering partial paralysis and was required to undergo emergency surgery to fuse three vertebrae in my neck.

43. Shortly after this surgery and during my rehabilitation from this most recent surgery in late 2009, I was again hospitalized for congestive heart failure for the first part of 2010.
44. I am still recovering and in rehabilitation from these health related setbacks.
45. I do not know whether I ever received a Maintenance Fee Reminder Statement from the PTO related to the 7.5 year maintenance fee for the '851 patent, due to my health problems.
46. I believe that the reason that my flip calendar handwritten system did not catch the due dates for the 7.5 year maintenance fee was because of my health issues.
47. Absent my poor health in 2004 and 2005, the 7.5 year maintenance fee and the 11.5 year maintenance fee would have been paid.
48. I was unaware that on April 1, 2005 the '851 patent expired for failure to timely pay the 7.5 year maintenance fee.
49. My practice of patent law was in Ohio, and I currently reside in Florida part time.
50. I first spoke with Mr. Chet Bonner of Calfee, Halter & Griswold LLP ("Calfee") on February 10, 2010 after recovering from a stay in the hospital.
51. I informed Calfee that all of my files relating to Petitioner's patents were locked up in Ohio and I was in Florida.
52. I was able to arrange to have the files for the '851 patent sent to Agratronix on or about March 16, 2010.
53. Agratronix requested its remaining files be transferred to Calfee for review.
54. I caused those remaining files to be delivered to Calfee on March 30, 2010.

55. Calfee informed me that there were not any letters regarding the 7.5 year maintenance fees in the paper files that I transferred to Calfee for review.
56. In early April 2010, I informed Calfee that I may have sent maintenance fee notices by email, without placing a copy in my files.
57. The electronically stored emails were also located at my address in Ohio.
58. I just relocated back to Ohio for the summer in mid-April 2010.
59. Calfee asked me to retrieve all of my electronically stored email communications regarding the '851 patent for the years surrounding the 7.5 year maintenance fee window and provide those emails to Calfee.
60. On May 4, 2010 I provided Calfee with all of the email correspondence in my possession between myself, and Farmex, Worens Group and Agratronix.
61. I declare under penalty of perjury that the foregoing is true and correct.

May 25, 2010

  
Vytas Matas

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**V. R. Matas****Attorney at Law**

2412 Cedarwood Road  
Pepper Pike, Ohio 44124 USA  
Phone: (440) 473-2530  
Fax: (440) 473-0120

May 14, 2003

**FARMEX**

RE: Intellectual Property Status Report

Dear Mike:

Listed below is the current status report of all the Farmex. cases presently being handled by me.

**PATENTS****I. Issued Patents:**

\* \*

FX-TM "Portable Grain Moisture Meter" (Match Commercial Testers)

Filed: 08/20/2001 US ONLY

Serial NO. 09/932,880

Patent No: 6,637,259

Issue Date: Paid Oct 28, 2003

Issue Fee Due 06/09/2003

Maintenance Fee Due 04/28/2007

FX-JF "Portable Grain Moisture Meter" (Auto Measure at Preset Compaction)

Filed: 08/02/2001 US ONLY

Serial NO. 09/920,916

Patent No: 6,570,395

Issue Date: May 27, 2003

Issue Fee Paid 04/02/2003

Maintenance Fee Due: 10/27/2006

EXHIBIT

\* \*  
*Paid*  
FX-1 "Portable Grain Moisture Meter" (Digital Display)  
Filed: 03/31/1994 US ONLY  
Serial NO. 08/220,885  
Patent No: 5,493,229  
Issue Date: 02/20/1996  
Maintenance Fee Due 08/20/2003 \$2,050  
*2007 3,150*  
*if paid*

X FX-1D "Portable Grain Moisture Meter" (Temperature Compensation)  
Filed: 08/01/1995 US ONLY  
Serial NO. 08/510,000  
Patent No: 5,663,650  
Issue Date: 09/02/1997  
X ABANDONED

FX-H1 "Portable Hay Bale Moisture Tester"  
Filed: 12/30/1997 US AND CANADA  
Serial NO. 09/000,747  
Patent No: 6,088,657  
Issue Date: 07/11/2000  
X ABANDONED BOTH US AND CANADA

PD-1 "Portable Moisture Tester" (Case Design)  
Filed: 09/15/2000 US ONLY  
Serial NO. 29/129,524  
Patent No: D443,534  
Issue Date: 06/12/2001  
Maintenance Fee Due 12/12/2004

FX-2 "Ex-Situ Grain Moisture Analyzer for a Combine"  
Filed: 09/25/1995 US  
Serial NO. 08/536,209  
Patent No: 5,616,851  
Issue Date: 04/01/1997  
Maintenance Fee Due 10/01/2004 \$2,050  
*OK*

FX-2 "Ex-Situ Grain Moisture Analyzer for a Combine"  
Filed: 09/23/1996 CANADA  
Serial NO. 2,186,210  
Patent No: 2,186,210  
Issue Date: 08/13/2002  
Maintenance Fees Paid Through Associate  
*OK*



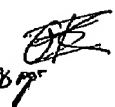
FX-1CIP "Multi-Lingual Portable Grain Moisture Meter"

Filed: 08/29/1997 US

Serial NO. 08/919,956

Patent No: 5,994,908

Issue Date: 11/30/1999

Maintenance Fee Due ~~05/30/2003 \$890~~ 05/30/2007 

### TRADEMARKS

Any state trademarks owned by Farmex were not transferred to Worens Group since it would be easier to file the more powerful federal marks directly in the Worens Group name rather than go to the trouble of preparing and executing assignments for the weaker state marks.

Thus we need advice as to which marks are to be filed and for which products.

Yours truly,

V. R. Matas  
Attorney-at-Law

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## IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Patent of:

McMahon, et al.

Patent No.: 5,616,851

Issued: April 1, 1997

App. No.: 08/536,209

Filed: Sept. 29, 1995

For: Ex-Situ Grain Moisture Analyzer  
For a Combine

Attorney Docket: 33572/04008

OFFICE OF PETITIONS

Mail Stop Petition  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450Declaration of Chet J. Bonner

1. I am an associate patent attorney at Calfee, Halter & Griswold LLP (hereafter "Calfee").
2. In August 2009, Agratronix engaged the services of Calfee to prepare and file a new patent application and shortly thereafter asked Calfee to identify and oversee all of Agratronix's issued patents. As part of its initial retention as Agratronix's patent counsel, Calfee was asked to identify all of the patents assigned to Farmex, Worens Group and Agratronix.
3. In 1995, the three inventors named in Application No. 08/536,209, which would later issue as U.S. Patent No. 5,616,851 ("the '851 patent"), each executed an assignment of all of their rights in the application to Farmex, Inc.
4. These inventor assignments were recorded with the PTO at Reel/Frame 007703/0729.

{00795582.DOC;1}

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5. The '851 patent issued in April 1997, and Farmex, Inc. is identified as the assignee on the face of the '851 patent.
6. In June 1999, Farmex, Inc. assigned all of the rights in the '851 patent over to Worens Group, Inc.
7. This assignment from Farmex, Inc. to Worens Group, Inc. was recorded with the PTO at Reel/Frame 010024/0571.
8. Mr. Matas informed me that he does not specifically recall sending a letter to either Mr. Worley, Mr. Stephens, or anyone else employed by Worens Group relating to the 7.5 year or 11.5 year maintenance fees being due for the '851 patent.
9. There is not a copy of such a letter in Mr. Matas' file for the '851 patent relating to the 7.5 year or 11.5 year maintenance fees.
10. There is no indication in Mr. Matas' file that he received the Maintenance Fee Reminder for the '851 patent that was mailed by the USPTO on October 20, 2004.
11. In addition, the file for the '851 patent did not contain a "notice of abandonment" for the '851 patent.
12. As part of Calfee's oversight of the Agratronix's patent portfolio, I reviewed the status of all of Agratronix's issued patents in August and September of 2009.
13. On September 10, 2009, Calfee provided Agratronix with a list of eight (8) issued United States patents, a Canadian patent, and a Canadian patent application along with the legal status of each of them.
14. I determined that five (5) of the United States patents and the Canadian patent application had expired.



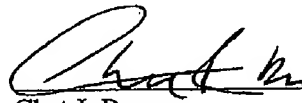
15. Calfee then began an investigation into the expired patents and determined that, although some of Agratronix's patents were intentionally abandoned, the '851 patent was erroneously allowed to lapse for failure to pay the maintenance fees. This discovery occurred on or about October 23, 2009.
16. Since discovering the expired patents in September 2009, Calfee has been collecting and reviewing materials, searching for missing documents, interviewing Agratronix employees and Mr. Matas and ascertaining the events leading to the expiration of the patents.
17. The investigation revealed that three (3) of the United States patents and the one Canadian patent application that expired were intentionally abandoned.
18. Calfee's initial efforts concentrated on the patent that had recently become abandoned because it was just within the time period for reviving under the unintentional standard. For that patent, U.S. Pat. No. 6,637,259, Petitioner promptly filed a petition to revive the patent on October 27, 2009 under the unintentional standard. The petition was granted by the PTO.
19. Because the '851 patent expired in 2005, considerable effort was required to investigate the facts and circumstances surrounding the failure to pay the 7.5 year and 11.5 year maintenance fees.
20. Calfee was unable to speak with Mr. Matas until February 10, 2010.
21. Mr. Matas explained that his normal practice was to inform Farmex or Worens Group that maintenance fees were due by letter, but he was unable to recall the particular circumstances surrounding the 7.5 year and 11.5 year maintenance fees for '851 patent.

22. Mr. Matas also explained that it was his standard practice to place a copy of such letters and any response(s) in his files.
23. Calfee needed to review Mr. Matas' file on the '851 patent prior to filing this petition. Mr. Matas informed Calfee, however, that all of his files relating to Petitioner's patents were locked up in Ohio and he was in Florida.
24. The files for the '851 patent were forwarded to Calfee on March 16, 2010.
25. I thoroughly reviewed Mr. Matas' file for the '851 patent, but I could not find any information relating to the 7.5 year or 11.5 year maintenance fees.
26. In search of additional documentation and to ensure that any letter(s) had not been misfiled, I requested that Petitioner's remaining files be transferred to Calfee for review.
27. Calfee obtained the remaining files on March 30, 2010, and I thoroughly reviewed all of the files that we received.
28. In accordance with the normal practice identified by Mr. Matas, several of the patent files did contain copies of letters to Farmex or Worens Group relating to payment of maintenance fees, and responses thereto.
29. Three of those files contained responses from Farmex or Worens Group instructing Mr. Matas to intentionally abandon those three patents. No such letter was found for the '851 patent.
30. My search of Mr. Matas' patent files revealed that in May 2003, Mr. Matas sent Worens Group an Intellectual Property Status Report ("IPSR") listing all of Worens Group's intellectual property along with upcoming deadlines.

31. The May 2003 IPSR is dated May 14, 2003; almost a year prior to the maintenance fee window opening for the '851 patent. The May 2003 IPSR provides a "current status report" of all nine (9) Worens Group patents then being handled by Mr. Matas. One of those patents was the '851 patent, the fifth item listed on page 2 of the letter. The status indicated that the 7.5 year maintenance fee was due the following spring.
32. After reviewing the files, Calfee was required to conduct several additional interviews of Mr. Matas to fill in missing details prior to completing the petition. In early April 2010, Mr. Matas informed Calfee that he may have sent maintenance fee notices by email, without placing a copy in his files and that those electronic files were located in Ohio.
33. Calfee asked Mr. Matas, who had just relocated back to Ohio for the summer, to retrieve all of his electronically stored email communications regarding the '851 patent for the years surrounding the 7.5 year maintenance fee window and provide those emails to Calfee.
34. On May 4, 2010, Mr. Matas provided Calfee with email correspondence between himself and Petitioner and its predecessors-in-interest.
35. From May 4 until mid-May 2010, I reviewed all of the email correspondence received by Calfee.
36. The email correspondence did not contain any additional information relating to payment of the 7.5 year maintenance fee, or the 11.5 year maintenance fee, for the '851 patent.
37. The only letter relating to the 7.5 year or 11.5 year maintenance fees for the '851 patent found in any of the files was the May 2003 IPSR.

38. Upcoming due dates for Petitioner's patent portfolio have been entered into Calfee's docketing system to ensure that future payments will be timely paid. Calfee has an electronic docketing system in place that tracks due dates for maintenance fees and client's instructions on whether or not to pay the maintenance fees. In addition, Calfee has a full-time docket clerk and a paralegal that are both responsible for paying maintenance fees for Calfee's clients in a timely manner.
39. I declare under penalty of perjury that the foregoing is true and correct.

May 24, 2010

  
Chet J. Bonner